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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

DAVID BURNET

No. ~~579~~ 31

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SANFORD & BROOKS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1930
CERTIORARI GRANTED MARCH 3, 1930

(34710)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 579

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SANFORD & BROOKS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 Before United States Board of Tax Appeals

For the taxpayer: Harry N. Baetjer, Esq. For the Comm'r: M. N. Fisher, Esq.

SANFORD & BROOKS COMPANY, SOUTH & WATER STS., BALTIMORE, MD., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

1926

Jan. 16—Petition received and filed.
" 20—Copy of petition served on Solicitor.
" 20—Notification of receipt mailed taxpayer.
Feb. 23—Answer filed by Solicitor.
Mar. 18—Copy of answer served on taxpayer. Assigned to General Calendar.

1927

May 5—Hearing had before Mr. Green on merits.
Mar. 16—Hearing date set May 5, 1927.
Briefs due Aug. 1, 1927.
" 23—Transcript of hearing May 5, 1927, filed.
June 29—Memorandum filed by G. C.
July 30—Brief filed by taxpayer.

1928

Apr. 9—Findings of fact and opinion rendered. Judgment will be entered for the respondent.
" 10—Order of redetermination entered.
Oct. 4—Supersedeas bond for $100,000 approved and ordered filed.
" 4—Petition for review by United States Circuit Court of Appeals, Fourth Circuit, with assignments of error filed by taxpayer with proof of service thereon.
2 Dec. 1—Praecipe with proof of service thereon filed by taxpayer.
Dec. 1—Statement of evidence lodged by taxpayer.
" 1—Motion for extension to December 31, 1928, for preparation and transmission of record filed by taxpayer.
" 3—Amended praecipe with proof of service thereon filed by taxpayer.
" 3—Order enlarging time to December 31, 1928, for filing certified copies of record papers sur petition for review entered.

Now, December 19, 1928, the foregoing docket entries certified from the record as a true copy.

(SEAL)

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

APPEAL OF SANFORD AND BROOKS COMPANY, a corporation, South and Water Streets (formerly 24 Commerce St.), Baltimore, Md.	Docket No. 11021.

Petition

Filed January 16, 1926

The petition to the United States Board of Tax Appeals by the Sanford and Brooks Company, a corporation, respectfully shows:

1. The petitioner, the taxpayer, is a Delaware corporation with its principal office at the corner of South and Water Streets (formerly 24 Commerce Street), Baltimore, Maryland.

2. Under date the 22nd day of June, 1925, the taxpayer was advised by the Commissioner of Internal Revenue under symbols IT:E:SM, RCH–B–19368, C–23285, that he had found income and profits taxes to be due by it for the year 1919 in the amount of
3 $3,818.15 and for the year 1920 in the amount of $50,883.90, a total deficiency in tax of $54,702.05. An appeal was taken from this ruling, hearing was granted on the 15th of September, 1925, or thereabouts, and under date November 17th, 1925, the taxpayer was advised that the conclusions of the department set out in its letter of June 22nd, 1925, showing a deficiency in tax in the amount of $54,702.05, as aforesaid, had been sustained; from this decision an appeal is taken to this Honorable Board. There is attached hereto, as a part hereof, a copy of the letter of November 17th to the taxpayer from the Commissioner of Internal Revenue and of the statement attached to said letter.

3. The claimed deficiency is in income and profit taxes. The amount which is asserted is $3,818.15 for the year 1919, and $50,883.90 for the year 1920, a total of $54,702.05, which is the amount in controversy.

4. The single assignment of error which the taxpayer alleges has been made is this:

In the year 1913, 1914, 1915, and 1916 the taxpayer, as agent for the Atlantic Dredging Company, was engaged in making excavations in the Delaware River, under a contract with the United States. In these years it lost on this contract $176,291.88, allocated as between those years as follows:

1913	$28,241.03
1914	68,117.81
1915	69,705.15
1916	10,207.89

These losses were operating losses, that is to say, the expenses incident to making the excavations exceeded the contract price for doing the work. Until after 1916 the taxpayer assumed the losses

had been made on account of its having taken an unprofitable contract. Subsequent to 1916, however, the taxpayer was told that certain representations made on behalf of the Federal Government, on the strength of which the contract was entered into, were false and misleading. It promptly discontinued the work and sued the United States in the Court of Claims on account of the
4 expenditure and loss made by it in the performance of the contract.

The Court of Claims in an opinion by Judge Hay, found that the loss sustained by the taxpayer was $211,050.59, which it allowed the claimant. On appeal to the Supreme Court of the United States the judgment of the Court of Claims was affirmed, and there was accordingly paid in 1920 to the taxpayer the amount of the judgment, with interest thereon of $16,305.71, a total of $227,355.80. The Atlantic Dredging Company was entitled to and there was paid to it $34,758.21, making the net amount received $192,579.59.

The interest allowed, $16,305.71, would under any circumstances be taxable income for the year 1920 in which it was received; deducting this sum from the amount received as aforesaid, after paying the Atlantic Dredging Company its pro rata share, left a balance of $176,273.88 (erroneously stated in the letter from the department of November 17th, 1925, as $148,207.16), the amount of which balance the taxpayer insists is taxable for the years 1913, 1914, 1915, and 1916, and so reported in its amended returns filed after receipt of the money. The Government has contended that this sum constitutes income for the year in which received, viz, 1920; it has so held, and the claimed deficiency in tax results from this holding.

5. The facts upon which the position of the taxpayer is grounded are these: The loss which was ultimately made good by the Government in accordance with the decision of the Supreme Court of the United States was sustained by the taxpayer in the years 1913, 1914, 1915, and 1916; the total loss was $176,291.88 and was allocated to the four years aforesaid in the following amounts, viz:

1913	$28,241.03
1914	68,117.81
1915	69,705.15
1916	10,207.89

These losses represented the cost of doing the work under the contract in excess of the amount paid for the work by the Government. The losses were sustained on account of the improper
5 withholding by the Government of information in its possession and which it failed to disclose to the taxpayer before it made its bid to do the dredging. As soon as the taxpayer learned of the facts which were known to the Government, but which had not been disclosed to it, it discontinued the work and instituted suit to recover the amount of its losses. The Court of Claims allowed it only its actual losses, with interest, so that the recovery

from the Government represents no profit but is simply a return to it of monies which it had expended for the account of the Federal Government induced thereto by the withholding of facts known to the Federal Government and not disclosed to it but improperly withheld from it. The decision of the Court of Claims was affirmed by the Supreme Court of the United States, the decision being reported in the reports of the Supreme Court, Vol. 253, at page 1.

6. The propositions of law involved in the appeal are three, viz:

(a) That the money recovered from the Federal Government is not properly income or profits subject to tax.

(b) That if it is taxable at all, it can be taxed only for the years in which it was earned.

(c) That the entire amount received should be added to the invested capital of the taxpayer for the years 1917, 1918, and 1919, and the invested capital correspondingly increased, with a resulting increase in the amount of earnings, exempt from tax.

In addition to the above a fourth question of law is also presented, viz, if the amount paid to the taxpayer is credited to the years in which the loss was sustained which is reimbursed by the payment, it will result in there being added to the invested capital of the taxpayer for the years 1917, 1918, 1919, and 1920 an amount equal to the amount of the payment, viz: $176,273.88, its invested capital being increased in each of said years by that amount. As a result of this addition to its invested capital, the taxpayer will be entitled to deduct from its earnings before computing the tax thereon, in addition to the amount heretofore deducted by it in its return an amount equal to the allowed percentage on the amount so paid to it. This will result in a sum due to the taxpayer of $4,484.08, as shown by its amended returns.

6

The taxpayer, of course, admits that it can not both collect the money as it has done and contend that it is a return to it of monies improperly expended for the account of the Federal Government and yet get the benefit of the failure of the debtor to pay when due by decreasing its profit by the amount withheld; it can, however, be held liable only to make good the benefit which it got by the original withhholding of the money, namely, by readjusting its earnings for the years, 1913, 1914, 1915, and 1916, and by crediting in those years the losses on the dredging contract sustained in each one of them, respectively, to the extent that the amount of these losses were subsequently refunded. This it has done in its amended returns, filed after the recovery of the money paid to it by the Federal Government. The loss covered by the refund was in no sense a loss charged off, as these words are used in the United States Taxing Statutes; as so used, the words imply a charging off with knowledge of all surrounding circumstances, as a positive act on

the part of the taxpayer and not a loss simply reflected in its operations.

Wherefore the taxpayer respectfully prays that this board may hear and determine its appeal.

SANFORD AND BROOKS COMPANY,
By W. B. BROOKS, *President.*

Attest:

A. L. HART, *Secretary,*
South and Water Streets, Baltimore, Md.

HARRY N. BAETJER,
Counsel for taxpayer.

7 Duly sworn to by Walter B. Brooks. Jurat omitted in printing.

Exhibit to petition

TREASURY DEPARTMENT

WASHINGTON

OFFICE OF COMMISSIONER OF INTERNAL REVENUE

Address reply to
Commissioner of Internal Revenue
and refer to
IT:E:SM-60D
RCH-B-19368
C-23285.

NOV. 17, 1925.

SANFORD AND BROOKS COMPANY,
24 Commerce Street,
Baltimore, Maryland.

SIRS: An audit of your income and profits tax returns for the years 1919 and 1920 has resulted in the determination of a deficiency in tax amounting to $54,702.05, as set forth in bureau letter dated June 22, 1925.

8 In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the corrections of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement con-

senting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: E: SM-60D, RCH-B-19368, C-23285. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner.*

By (Signed) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statements
Agreement—Form A

STATEMENT

IT: E: SM-60D
RCH-B-19368
C-23285

In re Sanford and Brooks Company, 24 Commerce Street, Baltimore, Maryland.

Year	Deficiency in tax
1919	$3,818.15
1920	50,883.90
Total	54,702.05

Reference is made to your protest without date against the action of the unit in holding that the amount of a judgment received in 1920 from the United States Government in the sum of $148,207.15 was income for that year instead of the year in which it was earned.

After a careful review of your protest and of all the evidence submitted in support of your contentions at a conference held in this office on September 15, 1925, you are advised that the bureau holds that the income from a judgment accrues to the taxpayer when a final determination has been made. In this case the final determination took place when the Supreme Court of the United States affirmed the judgment of the lower court.

Accordingly the conclusions set forth in bureau letter dated June 22, 1925, are sustained.

Now, December 19, 1928, the foregoing petition certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed Feb. 23, 1926

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

10 (1) Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of November 17, 1925.

(3) Avers that the profits tax for 1920 was determined under the provisions of sections 327 and 328 of the revenue act of 1918.

(4) Admits that the amount received by the taxpayer on account of the judgment rendered by the United States Supreme Court in 1920 was $176,273.88.

(5) Denies that the aforementioned sum is allocable to the years 1913 to 1916, inclusive.

(6) Denies that the losses in 1913 to 1916, inclusive, were sustained on account of the improper withholding by the Government of information in its possession.

(7) Admits that the taxpayer sustained losses in the years 1913 to 1916, but denies that the losses were in excess of the amount recovered.

(8) Admits that the taxpayer discontinued its work under the original contract and instituted suit.

(9) Admits that the Court of Claims allowed it to recover actual losses with interest and that the decision of the Court of Claims was affirmed by the Supreme Court of the United States.

(10) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified, or denied.

PROPOSITIONS OF LAW

(1) The sum of $176,579.59 with interest thereon amounting to $16,305.71 was income to the taxpayer in the year 1920 and not in any prior year.

11 (2) The profits tax for the year 1920 having been determined under the provisions of section 328 of the revenue act of 1918 on account of an abnormality affecting income, should, in the event the taxpayer prevails before the board, be recomputed under the provisions of section 301 of the revenue act of 1918.

Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:
M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, December 19, 1928, the foregoing answer certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Findings of fact and opinion

Petitioner entered into a contract with the United States for certain dredging work. The work was carried on from 1913 to 1916, during which time the expenditures made by petitioner under the contract exceeded the amount received. Petitioner brought suit in 1916 and recovered in 1920 an amount measured by the difference between the expenditures and receipts. The basis of the suit was misrepresentations by the Government representatives in the making of the contract. Recovery was allowed on the ground that
12 since there was misrepresentation the petitioner should be compensated for the work done. *Held*, that the amount of the judgment was income in 1920.

HARRY N. BAETJER, ESQ.,
For the petitioner.
M. N. FISHER, ESQ.,
For the respondent.

The commissioner determined deficiencies in income and profits tax for the years 1919 and 1920 in the respective amounts of $3,818.15 and $50,883.90. The principal issue is whether an amount received in 1920 under a decision of the Court of Claims, rendered in 1918 and affirmed by the Supreme Court in 1920, is taxable income, and, if taxable income, whether it is taxable in 1920 when received, or in 1913 to 1916, inclusive, when the transactions arose which gave rise to the judgment. The year 1919 is involved only in so far as invested capital for that year may be affected by a holding that the amount of the judgment was properly allocable as income from 1913 to 1916, inclusive.

FINDINGS OF FACT

The petitioner is a Delaware corporation with principal office in Baltimore, Maryland.

In 1912 the Atlantic Dredging Company entered into a contract with the United States Government to dredge a part of the Delaware River. During the years 1913, 1914, and 1915, the petitioner, as agent for the Atlantic Dredging Company, was engaged in carrying on the work under the contract. In December, 1915, after having operated at a loss under the contract to this time, the petitioner refused to proceed with the contract and subsequently, in 1916, brought suit in the Court of Claims against the United States to recover an amount of $545,121.72 in addition to the amount which had been paid it on the basis of the unit prices set out in the original contract and a supplemental contract later entered into. This suit was brought in the name of "Atlantic Dredging Company, W. E. Brooks, Agent."

The basis on which recovery was sought was the failure on the part of the United States to make a proper disclosure in its specification of the character of the material to be dredged.

13 June 3, 1918, the Court of Claims decided that the Atlantic Dredging Company was entitled to recover the sum of $211,050.09 and entered judgment for that amount. Atlantic Dredging Company v. United States, 53 Ct. Cls. 490.

Upon appeal to the Supreme Court of the United States, this judgment was affirmed in a decision rendered April 26, 1920. United States v. Atlantic Dredging Company, W. B. Brooks, Agent, 253 U. S. 1,

The amount of the judgment, $211,050.09, together with interest of $16,305.71, or a total of $227,355.80, was paid in 1920. Of this amount the Atlantic Dredging Company received $34,778.21, and the petitioner, $192,577.59. The latter amount included interest in the amount of $16,305.71, and left a balance of $176,271.88 which the petitioner received under the judgment on account of work which it had performed.

The petitioner actually expended in the prosecution of the work the sum of $354,009.19. Prior to the recovery under the judgment of the Court, petitioner had received from the Government on account of the work in question the sum of $142,959.10, making a difference between the amount expended and the amount received of $211,050.09, the amount recovered in the judgment. The part of this excess of expenditures over payments received, $176,271.88, which was applicable to the petitioner, related to the years 1913 to 1916 on the basis of the excess of expenditures over receipts in these years as follows:

1913	$28,241.03
1914	68,117.81
1915	69,705.15
1916	10,207.89
Total	$176,271.88

The United States did not at any time prior to 1920 admit or recognize any liability to petitioner in addition to the amount set forth in the contract, nor did petitioner have the claim which formed the basis of the judgment on its books as an asset on account of a debt due from the United States until payment was received in 1920.

14 The excess of expenditures made over payments received from the contract in question served to decrease the income reported for the years 1913 to 1916. These returns showed losses for 1913, 1915, and 1916, and net income for 1914.

The Commissioner held that the entire amount of the judgment was income in 1920, whereas the petitioner did not report any of it as income in 1920, but filed amended returns asking that it be treated as income in the years 1913 to 1916, inclusive.

OPINION

LITTLETON: The first question is whether the amount of the judgment constitutes income at any time. The petitioner, through its principal, the Atlantic Dredging Company, had a contract with the Government for the dredging of a part of the Delaware River. During 1913, 1914, and 1915, material was removed and payment made therefore on the unit basis set out in the contract and a supplemental contract later entered into. During these years, the petitioner experienced difficulty in carrying on its operations and the undertaking proved an unprofitable one, partly, at least, for the reason that the material to be dredged was found to be more difficult of removal than that set out in the specifications forming the basis of the contract. In December, 1915, petitioner refused to proceed with the contract and in 1916 brought suit in the Court of Claims to recover an additional amount under the contract, alleging misrepresentations on the part of the governmental contracting officers. The Court of Claims, in 1918, allowed recovery of the difference between the amount expended by petitioner in carrying on the work under the contract and the amount which had already been paid on account thereof. This judgment was affirmed by the Supreme Court in 1920, when it was paid. While it appears that the petitioner sought in this action to recover amounts for prospective profits, use of its plant, and certain overhead charges and office expense, the judgment limited the recovery to the difference between the amount expended in connection with work under the contract and the amount previously paid for the work done. In concluding its decision, the Court of Claims made the following statement which is indicative of the character of the payment:

But if the plaintiff had been induced to enter into the contract by representations as to the character of the material to be dredged, and upon which it was entitled to rely, and which turned out to be untrue, then at any stage of the work it had the right to stop work and to sue to recover for whatever amount might be justly due it *for the work which it had already performed.* (Italics ours.)

The Supreme Court, in affirming the decision of the Court of Claims, said:

The Government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We can not assent. There is no intimation of bad faith against the officers of the Government, and the Court of Claims regarded the representation of the character of the material as the nature of a warranty; besides, *its judgment is in no way punitive. It is simply compensatory of the cost of the work, of which the Government got the benefit.* (Italics ours.)

At the outset, it should be noted that we are here concerned with whether the amount of this judgment is properly to be included in

petitioner's gross income, and not whether the judgment constitutes an amount of net income subject to tax. Section 233 (a) of the revenue act of 1918 provides in the case of a corporation that "gross income means the gross income as defined in section 213" with certain exceptions not here material. Section 213 (a) reads as follows:

"That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Su-
16 preme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vacations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period: but * * *" In view of the fact that the Court of Claims held that the amount paid was an amount "due it for the work which it had already performed" and in view of the statement of the Supreme Court that the judgment was "in no way punitive" but was "simply compensatory of the cost of the work of which the Government got the benefit", it is difficult to see how it can be said that the amount received was not a part of petitioner's gross income. The amount received was an amount due under the contract on account of services performed thereunder. The dredging business in which petitioner was engaged was a business carried on for profit and the amounts received by the petitioner in such business were regularly reported as a part of its gross income. The holdings of the Court of Claims and the Supreme Court negative the conclusion that this judgment was anything other than a payment to be made of the same kind and character as that which was paid from 1913 to 1916 on the unit basis provided in the contract. On the theory on which the judgment was given, the petitioner should have been paid more in the years when it was rendering the services than it was paid. Certainly, if these payments had then been made no one would seriously contend that the amounts so received were not to be considered as a part of petitoner's gross income. Under such circumstances, the petitioner would have been taxed on the difference between such gross
17 income and the allowable statutory deductions and credits. Does the fact that the petitioner did not receive the entire

amount of compensation under the contract until 1920, and that when received, it was merely in an amount equal to the expenditures which were made under the contract change its character and make of it something other than income? We think not. There is nothing in either the decision by the Court of Claims or the Supreme Court to indicate that the judgment was other than compensation for work performed, and certainly under the statute and the judicial determinations made, compensation for the work here in question constitutes income. That it was measured by the expenditures made does not change its character. Nor do we understand that the judgment was a reimbursement for the expenditures made in the sense that the Government was obligated to make such reimbursement under the contract. The petitioner made expenditures under the contract that were allowable deductions from gross income, and they were so deducted and allowed in the returns for the years from 1913 to 1916, inclusive. Apparently the petitioner had income from sources other than this contract against which the expenses that measure the amount of this judgment were applied. But the judgment does not cancel these deductions; they were deductible on their own account when made and are in no sense changed by the fact that a judgment is awarded in the petitioner's favor as compensation for work which is equal in amount to the expenditures. The expenditures are deductions from gross income to the extent provided under the statute and the compensation is a part of gross income that must be accounted for in accordance with an entirely separate statutory provision.

We think the case of Bowers v. Kerbaugh-Empire Co., 271 U. S. 170, to which our attention is directed by the petitioner, is not in point. There the court was dealing with liquidation of a liability for a smaller sum in dollars than the face amount of such liability, something which at best might be denominated negative income, whereas this proceeding deals with the receipt of money for work done, positive income.

This brings us to the second phase of the question, i. e., When is the income represented by the judgment to be reported for tax purposes? The commissioner treated the entire amount as income in 1920, when the Supreme Court affirmed the judgment of the Court of Claims, and the judgment was paid, whereas the petitioner contends that the amount should be allocated to the years 1913 to 1916, inclusive, on the basis that expenditures made exceeded the amounts received in those years. The record does not disclose whether the petitioner was on a cash or accrual basis, but regardless of the method used, the board is of the opinion that the judgment could not be properly reported as income prior to 1920. On the cash basis, it would, of course, be includable in gross income only for 1920, since it was then paid. With respect to the accrual basis, we find that under the revenue act of 1913

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income to be reported is that received during the year for which a return is being rendered as distinguished from the later acts where both the cash and accrual bases are recognized. Maryland Casualty Co. v. United States, 251 U. S. 342. But even the accrual basis would not aid the petitioner for any of the years for which it desires to have the judgment allocated for the reason that the conditions precedent to the accrual of this income did not then exist. In United States v. Yale & Towne Mfg. Co., 269 U. S. 422, the court, in passing on the question when a tax accrues, said that a tax will accrue, when all events have occurred "which fix the amount of tax and determine the liability of the taxpayer to pay it.". The same general principles are applicable whether we are determining the accrual of taxes or the accrual of items of income or expense. In this proceeding it could not have been said at the end of 1916 that there had been any determination of liability on the part of the Government to pay the compensation in question. There was not only a denial at this time of liability on the part of the Government for the payment of any of the amount which was eventually recovered, but also the fixing of the liability was not accomplished until appeal was had to the Supreme Court. As evidence of the fact that doubt existed as to the existence of an obligation on the part of the Government to pay, we find that when the decision was rendered by the Court of Claims, the decision was accompanied by a strong dissenting opinion on the part of the chief justice of that court and likewise the decision of the Supreme
19 Court was dissented from by the Chief Justice and an associate justice. In such circumstances, we fail to see how any basis for an accrual of this compensation could be said to exist at any time prior to the decision by the Supreme Court.

The argument of the petitioner that the compensation should be placed in the years when the expenditures were made might, if accepted, afford a more equitable solution to the question here presented, but the board is of the opinion that no statutory authority exists for such action. While the case of Bowers v. Kerbaugh-Empire Co., supra, lends some color to the theory that we may look at a longer period than one year for the purpose of determining whether in fact a gain was realized or loss sustained in a given transaction, yet, for reasons already stated, we are of the opinion that an entirely different situation was there presented than in this proceeding. Under our system of Federal taxation an accounting period of one year has been prescribed as the basis for reporting income for tax purposes, and each taxable period stands alone with items of income and deductions determined in the light of events and circumstances transporting within that year. Here expenditures were made in the years 1913 to 1916 that were taken and allowed as proper deductions in those years, and the income in question was neither received in these years nor did a basis exist on which to account for it until 1920. We could no more transfer the income from 1920 to the earlier years for the purpose of taxing it than we could transfer the expenses to

1920 for the purpose of there allowing them as deductions. Furthermore, the years 1913 to 1916, inclusive, are not on appeal to the board, and the board accordingly can not make a determination of tax liability with respect thereto.

Reviewed by the board.

Judgment will be entered for the respondent.

Dissenting opinion

TRUSSELL, dissenting: The record in this case establishes that during the years 1913, 1914, 1915, and 1916 the petitioner was engaged in a dredging enterprise for the United States, and that during those years it disbursed moneys necessary to carry on the dredging work and received other moneys in part compensation for such work; that during the four years named the petitioner disbursed $176,-
20 271.88 more than it received and thereby sustained an actual money loss of the said amount of $176,271.88. Thereafter, as a result of litigation prosecuted through the Court of Claims and the U. S. Supreme Court, petitioner recovered the amount of money disbursed in excess of the amount received, together with interest in the amount of $16,305.71, which was paid to the petitioner in the year 1920.

If the Government had paid to the petitioner the amount of the judgment, $176,271.88, during the years in which the work was done, the petitioner's accounts for this dredging work would have exactly balanced as to receipts and disbursements, and it would have had no gain and no loss as the result of the enterprise. The amount of the judgment recovered in 1920, exclusive of the interest was, to use the language of the U. S. Supreme Court in U. S. v. Atlantic Dredging Co., 253 U. S. 12, "compensatory of the cost of the work of which the Government got the benefit."

The revenue act of 1918 levies income and profits taxes upon "gains or profits and income derived from any source whatever," and in Eisner v. Macomber, the Supreme Court defines income to be "the gain derived from capital, from labor, or from both combined." Gains, profits, and income are not produced by the judgment of a court but must be derived from the use of capital or labor, or both combined, in the circumstances and conditions which form the basis of the litigation resulting in the judgment. The facts in the instant case show conclusively that excluding the item of interest the use of the petitioner's capital and its employment of labor in the dredging enterprise produced no gains or profits.

While it is clearly established that during the years 1913 to 1916, inclusive, the petitioner sustained money losses in respect to this dredging enterprise aggregating $176,271.88, it may be true that in making the petitioner's income-tax returns for those years it recouped some small portion of such losses by reducing the amount of its income-tax liability for those years by using those losses as deductions. If such be the fact, and that can be clearly ascertained by an examination

of petitioner's income-tax returns for those years, the amounts by which petitioner's tax liability for those years was reduced can now be determined and such amounts may be properly found to fall within the definition of income in the year 1920, when it was finally
21 compensated for the losses sustained in the earlier years.

I am, therefore, of the opinion that in determining petitioner's gross income for the year 1920 there should be added to the amount originally reported the $16,305.71 of interest received in 1920, together with the amounts by which its income taxes for the years 1913 to 1916, inclusive, were reduced by the use of the dredging enterprise losses as deductions from gross income for those years.

SMITH concurs in the above dissent.

Dissenting opinion

PHILLIPS, dissenting: I concur in the opinion expressed in the first three paragraphs of the dissenting opinion propered by my associate but can go no further with him. It is my opinion that the judgment of the court in 1920 established that the expenditures made in prior years in excess of receipts were not in fact losses, but moneys expended for the benefit of the United States, the expenditure of which gave rise to an action to recover the amount. If this be so, there was no loss in the years 1913 to 1916 and no income in 1920 when the amounts due petitioner were recovered by it.

Now, December 19, 1928, the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated April 9, 1928, it is
22 Ordered and decided: That, upon redetermination, there is deficiency for the years 1919 and 1920 in the respective amounts of $3,818.15 and $50,883.90.

(Signed) B. H. LITTLETON,
Member United States Board of Tax Appeals.

Dated Washington, D. C.
Enter:
Entered Apr. 10, 1928.

Now, December 19, 1928, the foregoing order of redetermination certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Petition for review by the United States Circuit Court of Appeals for the Fourth Circuit of the decision of the United States Board of Tax Appeals, promulgated April 9th, 1928

Filed Oct. 4, 1928

Sanford & Brooks Company, by Harry N. Baetjer, its attorney, respectfully petitions the Honorable the United States Board of Tax Appeals and the Honorable the United States Circuit Court of Appeals for the Fourth Circuit for a review of the decision promulgated April 9th, 1928, in the above entitled cause, ordering and deciding that there existed a deficiency in tax paid by Sanford & Brooks Company for the years 1919 and 1920, in the respective amounts of $3,818.15 and $50,883.90.

23 Sanford & Brooks Company, appellant, respectfully says:

FIRST

That in the years 1913, 1914, 1915 and 1916, Sanford & Brooks Company, as agent for the Atlantic Dredging Company, was engaged in making excavations in the Delaware River, under a contract with the United States. In those years it lost on that contract $176,271.88; the losses as made in the several years being as follows:

1913	$28,241.03
1914	68,117.81
1915	69,705.15
1916	10,207.89

In 1916 the taxpayer learned that certain representations made on behalf of the Federal Government, on the strength of which it entered into the contract, were false: It discontinued the work and sued the United States in the Court of Claims on account of the expenditures made and the loss sustained by it in the performance of the contract. The Court of Claims allowed the taxpayer an amount equal to the cost of doing the work under the contract in excess of the amount paid for the same by the Federal Government, with interest; on appeal the decision of the Court of Claims was affirmed by the Supreme Court of the United States.

In 1920 the Government paid the appellant the amount found to be due by it in accordance with the opinion of the Supreme Court, viz, $176,271.88, with interest thereon amounting to $16,305.71.

The taxpayer accounted for the interest in the above amount as income received in the year 1920, but did not account for the balance of the amount recovered as income, on the theory that it was a return to it of money which it had expended and was not income.

The Commissioner of Internal Revenue contended that the entire amount, principal and interest, so received by the taxpayer in 1920 was income to it for that year. In reply to the contention of the commissioner the taxpayer claimed that if the principal amount paid to it was income at all it was properly allocable to the
24 years 1913, 1914, 1915, and 1916 in the amounts as to each of said years equal to the losses sustained by it in those years, respectively, on the above-named contract, and, although insisting upon its position as taken that the principal recovered was not income at all, it filed amended tax returns allocating this principal amount so received to the years 1913, 1914, 1915, and 1916 in the above amounts, respectively.

The taxpayer further contended that if the principal sum so received by it was income it was properly allocable to the years 1913, 1914, 1915, and 1916 in the above amounts, respectively, and that inasmuch as it had continuously since 1913 owned amounts in excess of the amount recovered the amounts so allocated to said years constitute increases for those years, respectively, and for all subsequent years to and including 1919, in the amount of its invested capital, a percentage of which (8%) it was entitled to deduct in calculating the amount of its excess profits taxes. If the last contention were correct, taxpayer contends that not only would there not be any liability against it for additional taxes for 1919 and 1920, but that it would have overpaid its taxes and would be entitled to a refund; except for the contention that if the amount involved is income then its invested capital was properly increased for the year 1919, rendering no additional tax due by it, there is no dispute as to additional taxes claimed for that year.

The claim for additional taxes for the year 1920, however, and the finding by the United States Board of Tax Appeals that such additional taxes are due, rests upon the finding that the principal of the monies received from the Federal Government in 1920 is income to the taxpayer and is income for the year in which it is received, viz, 1920, and is not allocable to the years 1913, 1914, 1915 and 1916.

SECOND

This petition seeks the review by the United States Circuit Court of Appeals for the Fourth Circuit of the aforementioned order of April 9th, 1928, of the United States Board of Tax Appeals.

25 THIRD

The errors asserted and intended to be argued are the findings by the United States Board of Tax Appeals:

(1) That the principal of the monies paid to the taxpayer by the United States of America pursuant to the decision of the Court of Claims of the United States, affirmed by the Supreme Court of the United States and received by the taxpayer in the year 1920, was

income to the taxpayer subject to tax, the taxpayer asserting and intending to argue that said sum was not income to it;

(2) that the principal sum so paid to the taxpayer by the United States of America was income to the taxpayer for the year 1920, in which year the money was paid to it and that the same was accountable for taxation as income received in the year 1920, the taxpayer asserting and intending to argue that if said sum of money was income at all, which it denies, it was allocable to the four years hereinbefore mentioned in the following amounts, respectively, viz:

1913	$28,241.03
1914	68,117.81
1915	69,705.15
1916	10,207.89

and as a corollary to (2) above:

(3) that the principal sum so paid by the United States of America is income but is not allocable to the years 1913, 1914, 1915, and 1916, and that no part thereof constitutes additions to the invested capital of the taxpayer for any of the years 1913 to 1919, both inclusive, and that taxpayer is not entitled to deduct any percentage of said additions in calculating the amount of its income subject to excess profits taxes for the year 1919.

Wherefore, Sanford & Brooks Company, taxpayer, respectfully prays that the decision of the United States Board of Tax
26 Appeals, promulgated April 9th, 1928, in the above captioned cause, be reviewed by the United States Circuit Court of Appeals for the Fourth Circuit.

Respectfully submitted.

SANFORD & BROOKS COMPANY,
By W. B. BROOKS, *President.*

Attest:
[SEAL.] A. L. HART, *Secretary.*

HARRY N. BAETJER,
Counsel for taxpayer.

Duly sworn to by Walter B. Brooks and A. L. Hart. Jurat omitted in printing.

27 Receipt of a copy of the within petition for review is hereby admitted this 4th day of Oct., 1928.

C. M. CHAREST, VII.

Now, December 19, 1928, the foregoing petition for review certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Amended praecipe for record

To the Honorable, the Clerk of the United States Board of Tax Appeals:

Please transmit to the United States Circuit Court of Appeals for the Fourth Circuit the following papers in the above captioned matter, to the end that the decision of the United States Board of Tax Appeals in said matter may be reviewed by said Court, viz:

1. The docket entries of the proceeding before the board.
2. Pleadings before the board.
28 3. Findings of fact, opinion and decision of the board.
4. Order of redetermination.
5. Petition for review.
6. Order of said board by a member thereof extending the time for the transmission to said United States Circuit Court of Appeals of the above papers, to the date fixed in said order.
7. This amended praecipe.

All of said papers to be duly certified as correct copies of the originals thereof.

HARRY N. BAETJER,
Solicitor for Petitioner.

Service acknowleged this 3rd day of December, 1928.

C. M. CHAREST,
General Counsel, Bureau of Int. Rev.,
Solicitor for Respondent.

Now, December 19, 1928, the foregoing amended praecipe certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

29 In United States Circuit Court of Appeals for the Fourth Circuit

No. 2827

SANFORD & BROOKS COMPANY, PETITIONER

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On petition to review the decision of the United States Board of Tax Appeals

Docket entries

December 31, 1928, the transcript of record is filed and the cause docketed.

Same day, the appearance of Harry N. Baetjer is entered for the petitioner.

Same day, certified copy of order enlarging the time for the filing of the record is filed.

January 5, 1929, the appearance of Mabel Walker Willebrandt, Assistant Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue; and Clark T. Brown, Special Attorney, Bureau of Internal Revenue, is entered for the respondent.

January 15, 1929, twenty-five copies of the printed record are filed.

March 2, 1929, stipulation as to the time for the filing of respondent's brief is filed.

30 April 2, 1929, the appearance of Sewall Key, Special Assistant to the Attorney General; John Vaughan Groner, Special Assistant to the Attorney General; and Andrew D. Sharpe, Special Assistant to Attorney General, is entered for the respondent.

ARGUMENT OF CAUSE

April 22, 1929 (April term, 1929), cause came on to be heard before Waddill, Parker, and Northcott, circuit judges, and is argued by counsel and submitted.

31 In United States Circuit Court of Appeals

Fourth Circuit

No. 2827

SANFORD & BROOKS COMPANY, PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On petition to review the decision of the United States Board of Tax Appeals

(Argued April 22, 1929. Decided October 15, 1929.)

Before WADDILL, PARKER, and NORTHCOTT, Circuit Judges.

Opinion

Filed October 15, 1929

32 PARKER, Circuit Judge: This is a petition by a taxpayer to review a decision of the Board of Tax Appeals. Petitioner, as agent for the Atlantic Dredging Company, was engaged during the years 1913, 1914, and 1915 in dredging a part of the Delaware River under a contract with the United States. It expended in the performance of the contract a total of $176,271.88 in excess of the amounts received thereunder. In December, 1915, it learned that certain vital representations, on the faith of which the contract had

been accepted, were untrue, whereupon, it stopped work and, in 1916, instituted suit against the United States in the Court of Claims for the losses under the contract and for the profits which would have been realized on the basis of a contract subsequently entered into. The Court of Claims gave judgment in favor of petitioner, but only for the actual loss which it had suffered; and this judgment was affirmed by the Supreme Court (U. S. v. Atlantic Dredging Co. 253 U. S. 1) on the ground that it was "simply compensatory of the cost of the work, of which the Government got the benefit."

Under this judgment there was paid to petitioner in the year 1920 the sum of $192,577.59, which amount represented the $176,271.88 loss with interest on same amounting to $16,305.71. The Commissioner of Revenue held that this entire amount was taxable as income for the year 1920; and the Board of Tax Appeals sustained this holding. Petitioner concedes that the $16,305.71 representing interest is thus taxable, but contends that the $176,271.88, being mere reimbursement of loss, is not. It appears that in its returns for the years 1913 to 1916 petitioner claimed as losses the excess of expenditures over receipts under the contract and that this served to decrease the income reported during these years. After the collection of the judgment, however, it filed, or proposed to file,
33 amended returns for the years in question, eliminating the losses claimed under the contract, which had been reimbursed under the recovery against the Government.

Two questions are presented by the petition: (1) whether the amount collected under the judgment in reimbursement of the losses sustained under the contract is taxable income within the meaning of the income tax law: and (2), if not, whether petitioner, by reporting the excess of expenditures over receipts under the contract as losses during the years when they occurred, must be held to have made a final election in the matter and to be now estopped thereby from claiming that the recovery should be treated as extinguishment of loss and not as income. We think that both of these questions must be answered in the negative.

On the first question, it should be observed that income, even gross income, within the meaning of the taxing acts, is not synonomous with receipts; for receipts may represent a mere reimbursement of capital expenditure, and certainly it was not the intent of Congress to tax this. See opinion of Commissioner Korner in the appeal of James P. McKenna 1 B. T. A. 326, 333. There has been much discussion as to what is meant by "income" as that word is used in the income tax laws; but it would seem that the Supreme Court has settled the matter. After full consideration, that court has declared that income within the meaning of these laws may be defined as gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets. Eisner v. Macomber 252 U. S. 189, 207; Bowers v. Kerbaugh-Empire Co. 271 U. S. 170, 174.

Now the amount collected by the petitioner as reimbursement of loss is certainly not income within this definition. It is not gain derived from capital, from labor or from any other source. A case directly in point is that of Marshall v. Commissioner 10 B.
34 T. A. 1140, in which it was held that an amount received under the War Minerals Relief Act, as partial reimbursement for losses sustained, did not constitute income. In that case it appeared that the taxpayer in 1918 had erected a plant for carrying out a Government contract. With the signing of the armistice it found itself with a worthless plant on its hands, from which only a small amount was realized as salvage. In 1921 the Government reimbursed it for its capital outlay to the extent of $20,048.77. In holding that this was not taxable as income for the year 1921, the Board of Tax Appeals said: "We do not see how the partial reimbursement for losses sustained can be construed to be income", and quoted from Bowers v. Kerbaugh, supra: "The mere diminution of loss is not gain, profit, or income."

It is said however, that each year must be treated as a unit for income tax purposes, and that for this purpose we must view the expenditures and collections of each year entirely apart from those of other years. It is undoubtedly true that the year is the unit in income taxation and that income received or accrued within a given year must be reported as of that year: but it by no means follows that the events of other years may not be considered along with a particular item of alleged income in determining whether it constitutes taxable income or mere reimbursement of loss. As a matter of fact, the regulations of the Treasury Department in many instances expressly provide for reference to matters occurring in other years as a means of determining the income of a particular year. Thus under article 52 of Regulation 45, issued under the 1918 act, it is provided:

"In view of the unusual conditions prevailing at the close of the year 1918 it is recognized that many items of gross income, such as claims for compensation under cancelled contracts, together
35 with claims against contracting departments of the Government for amortization and other matters, while properly constituting gross income for the taxable year 1918 were undecided and not sufficiently definite in amount to be reported in the original return for that year. In every such case the taxpayer should attach to his return a full statement of such pending claims and other matters, and when the correct amount of such items is ascertained an amended return for the taxable year 1918 should be filed."

We are dealing here with a long-term contract, extending into a number of taxing periods; and from the beginning of the experience of the Federal Government with income taxation, it has been found necessary to provide either for the return of income after the completion of such a contract or for the amending of returns at that time upon the basis of facts then ascertained. See T. D. 2161; Regulation 33, Art. 121; Regulation 45, Art. 36; Regulation 69, Art. 36;

Regulation 74, Art. 334. Regulation 33, Art. 121, while directed to the application of the act of Sept. 8, 1916, was based upon Treasury Decision 2161, which was promulgated Feb. 19, 1915, in construing the act of 1913. That article provided:

"Art. 121. Contracting corporations.—Corporations engaged in contracting operations and which have numerous uncompleted contracts, which in some cases run for periods of several years, will be allowed to prepare their returns so that the gross income will be arrived at on the basis of completed work—that is, on jobs which have been finally completed—any and all moneys received in payment for completed jobs will be returned as income for the year in which the work was completed. If the gross income is arrived at by this method, the deduction from gross income should be limited to the expenditures made on account of such completed contracts.

36 "Income on basis of estimates.—Or the percentage of profit from the contract may be estimated on the basis of percentage of completion and payments made thereon, in which case the income to be returned each year during the performance of the contract will be computed upon the basis of the expenses incurred on such contract during the year; that is to say, if one-half of the estimated expenses necessary to the full performance of the contract are incurred during one year, one-half of the gross contract price should be returned as income for that year; all under or over statements of income to be adjusted upon completion of the contract and return made accordingly. (T. D. 2161.)"

This article was brought forward in substantially the same form in the other regulations referred to above. The last clause of the article, however, was changed in subsequent regulations, evidently for the purpose of clarity, so as to provide:

"Upon the completion of a contract if it is found that as a result of such estimate or apportionment the income of any year or years has been overstated or understated, the taxpayer must file amended returns for such year or years."

The case of the petitioner here falls within the spirit if not within the letter of this regulation. Its contract with the Government was never completed in a technical sense; but upon the collection of the judgment there was a completion of what was necessary to be done to determine what was to be received for the work done under the contract. Petitioner then, under the regulation quoted, should have filed amended returns for the years for which it appeared that its income had been understated as a result of deducting supposed losses arising during the contract's performance; for the amount received from the Government was reimbursement of these losses, not gain or profit or other accretion of wealth.

37 The case of U. S. v. Anderson, 269 U. S. 422, is cited as sustaining the proposition that each twelve months' period must be treated as a unit for the determination of income for tax purposes, "each taxable period standing alone, with items of income

and deductions determined according to the events of that year." That case, however, does not support any such proposition. It holds that, where a corporation keeps its books and makes its returns upon the accrual basis, it is not permissible to defer to a subsequent year the deduction of a tax, imposed on business done during the year, merely because such tax is assessed and paid during the subsequent year; and the basis of the decision is that the taxpayer, having elected to keep its books and report its income upon the accrual basis, must deal with all matters where practicable, including taxes, upon the same basis. There is nothing in the decision which lends any support to the proposition that reimbursement of loss is to be treated as income because received in a year subsequent to that in which the loss occurred.

Nor do we think that the action of petitioner in claiming the losses under the contract as deductions from income for the years 1913 to 1916 estops it from denying that the recoupment of these losses is income. It is true, of course, that in ordinary cases where credit is taken for a loss, as by charging off a bad debt, its subsequent recoupment will be treated, not as reimbursement of loss, but as receipt of income. See Regulation 69, Art. 50. But this rule is based upon the fact that the taxpayer, with knowledge of his rights deliberately chooses to treat the loss as absolute and to make settlement of the taxes for the year upon that basis. Having done this, he will not be heard to say thereafter that he received value from what he deliberately elected to have the government treat as worthless. We do not think, however, that this rule has any
38 application in the case of a long term contract, as to which the regulations expressly provide for the filing of amended returns where, upon its completion, it is found that the income of any year or years has been overstated or understated. Petitioner's deduction of losses during the years when the contract was being performed is not analogous to the deduction of a loss resulting from the charging off of a bad debt. Here nothing was charged off. Losses were claimed as a result of expenditures made in the ordinary course of business; but petitioner had no claim under its contract for reimbursement of these expenditures, and no claim on account thereof was charged off or was even set up as an asset on its books, until after the collection of its judgment. Estoppels are not favored in the law; and, in the fact that the excess of expenditures over receipts was claimed as a loss, we see nothing which should be held to estop petitioner from treating reimbursement of this loss in accordance with its true character.

The case of Inland Products Co. v. Blair (C. C. A. 4th) 31 Fed. (2d) 867, is very much in point. In that case the government had erroneously collected a soft drink tax upon sales of sweet cider, and the amount so collected had subsequently been refunded. The tax-

payer had claimed as deductions from his taxable income the amounts paid as tax. This Court held that, upon refunding the moneys erroneously collected, the government could reform the tax returns for the years when the taxes were paid and eliminate the deductions claimed on account thereof. The taxpayer strenuously contended that the refund should be treated as income in the year when receiver, and that we had no right to consider subsequent occurrences as bearing upon matters covered by the returns. We thought, however, that we should regard substance and not form and should treat the refund of the taxes not as the receipt of
39 income but as the correction of a mistake. The same principle is applicable here. The recovery of the $176,271.88 was not, it is true, the correction of a mistake; but it was a payment in reimbursement of a loss for which a deduction had been claimed, just as it had been claimed in the case of the taxes erroneously paid.

After all has been said that can be said with regard to the various technical aspects of the case at bar, the fact remains that to sustain the tax on the $176,271.88 recovered as reimbursement for loss is to sustain a tax on income where no income has been in fact received. We do not see how this could be justified either under the income tax law itself or under any legal principle which could be invoked in its interpretation. There can be no doubt that the right and justice of the case require that the $176,271.88 be treated not as income but as reimbursement of loss; and we know of no legal principle under which what is so manifestly just and right may be defeated and the Government placed in the unseemly position of reimbursing a loss with one hand and, under the guise of taxation, taking away a part of the reimbursement with the other.

The decision of the Board of Tax Appeals will be reversed, and the case will be remanded with directions that upon petitioner filing amended returns for the years 1913 to 1916, eliminating the deductions claimed on account of the loss which has been reimbursed, the amount received in reimbursement be eliminated from the computation of taxable income for the year 1920. Of course, the item of $16,305.71, received as interest, should be included in the computation of income for that year.

Reversed and remanded.

Dissenting opinion

NORTHCOTT, Circuit Judge, dissenting: The petitioner, as agent for the Atlantic Dredging Company, was engaged in dredging a
40 part of the Delaware River during the years 1913, 1914, 1915, and 1916, under a contract with the United States. It expended, in those years, in doing the work, a total of $176,271.88 in excess of the payments received for the same, the amount of said excess, allocated to those years (1913 to 1916) on the basis of excess

of expenditures made over payments received in each year, being as follows:

1913	$28,241.03
1914	68,117.81
1915	69,705.15
1916	10,207.89
Total	176,271.88

In the year 1916 petitioner learned that certain representations which had been made on behalf of the United States, and on the strength of which the contract was accepted, had been misleading, and it discontinued the work and instituted suit in the Court of Claims against the United States to recover the amount of loss sustained by it, in the performance of the contract as well as damages.

The Court of Claims found that the expenditures made by petitioner in the performance of the contract had amounted to $211,050.00 more than it had received in payment for the work, which amount the court allowed to the claimants. On appeal to the Supreme Court of the United States, the judgment of the Court of Claims was affirmed and there was accordingly paid to the taxpayer in 1920 the amount of the judgment rendered in its favor, with interest thereon amounting to $16,305.71, a total recovery of $227,355.80. The Atlantic Dredging Company was entitled to and there was paid to it $34,778.21, making the net amount received by the petitioner $192,577.59.

41 This appeal is taken from the final order of the United States Board of Tax Appeals, holding that the amount received by the petitioner in the year 1920 was properly included in the petitioner's gross income for that year for the purpose of taxation.

The statute involved is revenue act of 1918, c. 18, 40 Stat. 1057, 1058, 1070.

The petitioner contends that instead of being taxed on the amount in controversy in 1920 as a part of its gross income that its returns for the years 1913, 1914, 1915, and 1916 should be reformed in accordance with the recovery had for the losses during those years in the contract in question. Petitioner further contends, in view of the fact that there was no profit recovered by it on the contract, the amount recovered in the year 1920, besides from the interest, was not gross income for the purpose of taxation, and petitioner further contends that, as it was finally settled in the litigation that the United States was at fault with regard to the contract, it would be an injustice to permit the Government to recover taxes on the amount paid by it, when no profit was earned in the transaction.

It must be borne in mind that the Government in procuring the dredging in the Delaware River acted in a different capacity from that in which it acted as tax gatherer in the year 1920, and this case must necessarily be considered just as though the dredging contract had been made by the petitioner with a private corporation or an individual.

The sum received in 1920, in satisfaction of a judgment on account of work previously done, although no profit is included, undoubtedly constitutes gross income for the year 1920. The business was carried on in effort to make a profit, and the fact that no profit resulted does not change the character of the money received.

The year is necessarily the unit for the determination of
42 income for tax purposes, each taxable period standing alone; the result determined according to the events of that year.

United States v. Anderson, 269 U. S. 422.

This must of necessity be the case. Let it be supposed that the petitioner instead of losing during the four years involved, and recovering in the one year, had lost in one year, and had recovered on doubtful claims in four different years subsequently, certainly upon recovery in each of the four years the Government could not be required to go back and reform the tax assessment for the one year in which the loss was incurred, or four different times. To hold this would be to hold that the assessment of taxes by the Government would never be completed for any given year, and would bring about a situation that would be chaotic.

" * * * In interpreting the law we are not to assume that a system based upon yearly gains and losses was so contrived as to admit deviations in principle which must always operate to the taxpayer's advantage."

DeLoss v. Commissioner, 28 Fed. (2) 803.

Under the revenue act of 1913, under which the original returns by petitioner for years 1913, 1914, 1915, and 1916 were made, the income to be reported was that " received " during the year for which the return was made.

Maryland Casualty Company v. United States, 251 U. S. 342.

Compensation for services rendered or work done must be reported as gross income for the year when received, regardless of the year in which the work was performed.

Jackson v. Smietanka, 267 Fed. 932.

Edwards v. Keith, 231 Fed. 110.

Woods v. Lewellyn, 252 Fed. 106.

43 The fact, that the losses were made and reported over a period of four years and the recovery had in one year worked to the financial disadvantage of the petitioner, is merely an incident. It might have worked to his advantage. In any event, the whole tax collection system of the Government can not be upset or changed to meet the exigencies of a particular case. One rule must be laid down for all, and Congress has seen fit to lay down the rule that the year is the unit, and we can see no reason for disregarding the rule.

It is contended on behalf of the petitioner that the cases of Eisner *v.* Macomber, 252 U. S. 189, and Bowers, collector *v.* Kerbaugh-Empire Company, 271 U. S. 170, support their contention. I do not think so. These decisions are not properly applicable to the facts in this case.

44 In United States Circuit Court of Appeals

Fourth Circuit

No. 2827

SANFORD & BROOKS COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Judgment

Filed and Entered October 18, 1929

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said United States Board of Tax Appeals for further proceedings in accordance with the opinion of the court filed herein.

JOHN J. PARKER,
U. S. Circuit Judge.

October 18, 1929.

45 November 12, 1929, petition of respondent for stay of the mandate is filed.

In United States Circuit Court of Appeals

Order staying mandate

Filed November 12, 1929

Upon the application of the respondent, by C. M. Charest, Esq., his counsel, and for good cause shown,

It is ordered, That the mandate of this court in the above case be, and the same is hereby, stayed pending the application of the respondent in the Supreme Court of the United States for a writ of certiorari to this court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

JOHN J. PARKER,
U. S. Circuit Judge.

November 12, 1929.

November 20, 1929, petition of petitioner and stipulation that Robert H. Lucas, Commissioner of Internal Revenue, be substituted as party respondent, is filed.

In United States Circuit Court of Appeals

Order substituting Robert H. Lucas for David H. Blair

Filed and entered November 20, 1929

Upon the above motion and stipulation, it is this 20" day of November, 1929, by the United States Circuit Court of Appeals, Ordered, That the motion be granted and that the above-entitled cause be revived so that the same will be pending as against Robert H. Lucas, as Commissioner of Internal Revenue of the United States.

And it is further ordered, That said Robert H. Lucas, as such Commissioner of Internal Revenue, be substituted in the above-
46 entitled cause for David H. Blair, formerly Commissioner of Internal Revenue of the United States.

EDMUND WADDILL, JR.,
U. S. Circuit Judge.

December 11, 1929, motion of respondent for a further stay of the mandate is filed.

In United States Circuit Court of Appeals

Order further staying mandate

Filed December 11, 1929

Upon the application of the respondent, by C. M. Charest, Esq., general counsel, Bureau of Internal Revenue, and for good cause shown,

It is ordered, That the mandate of this court in the above case be, and the same is hereby, further stayed pending the application of the respondent in the Supreme Court of the United States for a writ of certiorari to this court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

EDMUND WADDILL, JR.,
United States Circuit Judge.

December 11, 1929.

47 [Clerk's certificate to foregoing transcript omitted in printing.]

48 Supreme Court of the United States

Order allowing ceritorari. Filed March 3, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And

it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34710. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 579. Robert H. Lucas, Commissioner of Internal Revenue, Petitioner, vs. Sanford & Brooks Company. Petition for writ of certiorari and exhibit thereto. Filed January 16, 1930. File No. 34710

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